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October 24, 1996

Via Hand Delivery

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 (CC Docket No. 96-187)*

Dear Mr. Caton:

Please find enclosed an original and seventeen copies of the Reply Comments of Southwestern Bell Telephone Company in the above-captioned matter. Please provide each Commissioner with a personal copy of this document.

Please date stamp the seventeenth copy and return it to the individual delivering this package.

Thank you for your assistance with this matter.

Sincerely,

Sean A. Lev

Enclosures

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(via hand delivery)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996.	CC Docket No. 96-187

REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

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October 24, 1996

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CC Docket No. 96-187

Reply Comments of
Southwestern Bell Telephone Company

SUMMARY

Some commenters urge the Commission to adopt approaches to streamlined tariffing that are contrary to the plain language of the 1996 Act and that would subvert Congress' evident intent to create sweeping deregulatory reforms. The Commission should reject these proposals.

In particular, the Commission should cast aside the argument that a tariff that is "deemed lawful" is merely "presumed lawful." That contention is contrary to the clear meaning of the word Congress employed. The term "deemed" is used throughout the Communications Act -- and, indeed, throughout the United States Code -- to mean "determined to be the case by operation of law." The Supreme Court, moreover, has made clear that that is indeed the meaning that Congress ascribes to that word. The Commission may not disregard this well-established and natural understanding of the statutory text in favor of parties' unfounded speculation as to the legislature's actual desires.

For similar reasons, the Commission must reject arguments suggesting that it is free to defer streamlined tariffs for up to 120 days without suspending them. Such contentions are inconsistent with clear language in § 204(a)(3) indicating that such a tariff may not take effect only if the Commission exercises its suspension authority.

Comments arguing that streamlining applies only to a subset of local exchange carrier tariffs suffer from the same defect. They ignore the fact that Congress said in no uncertain terms that streamlined treatment applies broadly to any "new or revised charge, classification, regulation, or practice" and that the specific 7/15 day notice period applies to "[a]ny such charge, classification, regulation, or practice."

Finally, proposals urging the Commission to add new regulatory burdens to the ones that already exist satisfy no conceivable definition of "streamlining" and thus cannot be adopted.

Indeed, instead of creating new regulatory hurdles, the Commission should move quickly to abolish two existing, and particularly onerous, requirements -- its cost-support rules and its Part 69 waiver process.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996.	CC Docket No. 96-187

REPLY COMMENTS
OF SOUTHWESTERN BELL TELEPHONE COMPANY

Many of the comments submitted in response to the NPRM[1] in this proceeding urge the Commission to take a grudging approach to implementing Congress' express directive to streamline local exchange carrier (LEC) tariffs. They exhort the Commission to make only the most minor changes to existing rules and, in some instances, even to add whole new regulatory requirements to the ones that already exist.

These suggestions are deeply flawed. First, many of these comments champion results that have no grounding in the language of the 1996 Act. They suggest -- sometimes quite brazenly -- that the Commission simply assume that Congress meant something quite different than what it actually said. Capital Cities/ABC, for example, argues that when Congress directed that tariffs would be "deemed lawful" unless the Commission acts within 7 or 15 days, it "surely must have intended" something other than the ordinary meaning of that phrase. In particular, Congress "surely must have" meant LEC tariffs "to be 'presumed' lawful rather than 'deemed'

[1] See Notice of Proposed Rulemaking (NPRM), Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 96-367 (released Sept. 6, 1996).

lawful."[2] But the Commission is not free to rely on such speculation as to Congress' unspoken desires. It must adhere to the language that the legislature in fact used. Accordingly, suggestions like this one -- as well as others that are not as blunt, but are equally misguided -- must be rejected.

Second, many commenters lose sight of the fact that Congress did not simply tinker around the edges of the current regulatory regime; it transformed it. As the Commission itself has pointed out, the 1996 Act was designed to create "sweeping changes" in the regulatory environment to create a "'pro-competitive, de-regulatory national policy framework.'"[3] It is fundamentally inconsistent with that intent -- as well as the language of the statute -- to adopt "streamlining" measures that make only cosmetic changes in tariffing rules or, even worse, actually add to the regulatory burdens facing LECs. Indeed, as we discuss below, we agree with the commenters who suggest that the Commission go beyond its suggestions in the NPRM and move quickly to repeal some of the most significant regulatory burdens facing LECs.

I. THE PLAIN MEANING OF THE PHRASE "DEEMED LAWFUL" MANDATES THE CONCLUSION THAT LEC TARIFFS THAT ARE NOT SUSPENDED MUST BE TREATED AS LAWFUL (NPRM ¶¶ 5-15).

The failure of many commenters to come to grips with the language of the statute is nowhere more evident than in their approach to Congress' mandate that LEC tariffs "shall be

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[2] Comments of Capital Cities/ABC, Inc., et al., at 5.

[3] NPRM ¶ 1 (quoting Joint Statement of Managers, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. Preamble (1996)) (emphasis added) .

deemed lawful" unless the Commission acts quickly to suspend them.[4] Numerous parties attempt to avoid the well-established rule that carriers cannot be liable for damages for charging "lawful" rates[5] by suggesting that tariffs "deemed lawful" under this section need not in fact be treated as "lawful." These commenters (drawing on a reading proposed as an alternative in the NPRM) suggest that tariffs "deemed lawful" should only be "presumed lawful."[6]

These parties, however, fail to adduce any evidence to support the proposition that the word "deemed" is ordinarily understood to mean "presumed." Instead, they speculate that Congress must have intended this meaning because it could not have wanted to create "a radical change" in the law by precluding damages liability.[7] But the best indication of what Congress

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[4] More fully, the relevant sentence states that any LEC tariff filed on a streamlined basis "shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under [47 U.S.C. § 204(a)(1)] before the end of that 7-day or 15-day period, as is appropriate." 47 U.S.C. § 204(a)(3).

[5] See Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 384 (1932). Significantly, there is little suggestion in the comments that the word "lawful" should not be understood in this well-established sense. On the contrary, AT&T itself notes that Congress must be taken "to have known and understood th[e] body of precedent" concerning tariffs. AT&T Comments at i.

[6] See, e.g., MCI Comments at 3-6; AT&T Comments at 4-8; Frontier Corp. Comments at 2.

[7] AT&T Comments at 4; see also General Services Administration (GSA) Comments at i (emphasizing "lack of legislative history" supporting a "sweeping change" in the law); America's Carriers Telecommunications Ass'n (ACTA) Comments at 5 (Congress could not have intended its language "to work a major substantive change in the law").

intended is, of course, the words it used. And, as Pacific Telesis has explained persuasively, Congress has routinely used the word "deemed" in the Communications Act in its natural sense -- to mean "determined to be the case by operation of law."[8] Congress thus directed that the Commission was "deemed to be organized" when four members took office,[9] that a forbearance petition "is deemed granted if the Commission does not deny [it] for failure to meet [certain] requirements" within a year,[10] and that a donation received by the Commission "shall be deemed to be a gift, bequest or devise to the United States" for tax purposes.[11] In none of these cases can Congress be understood merely to have created a rebuttable "presumption."

That is true as well of Congress' use of the term elsewhere. In the closely analogous context of railroad rate deregulation, for example, Congress employed language nearly identical to that at issue here to create a substantive change in legal status, not a presumption. Specifically, until its recent repeal, the Staggers Act stated that, unless challenges to certain railroad rates were brought within a 180-day period, those rates "shall be deemed to be lawful and may not thereafter be challenged."[12] Other statutes are to the same effect.[13]

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[8] Pacific Telesis Group Comments at 4.

[9] 47 U.S.C. § 707.

[10] Id. § 160(c).

[11] Id. § 154(g)(3)(c).

[12] 49 U.S.C. § 10701a Note (repealed Dec. 29, 1995).

[13] See, e.g., Pub. L. No. 89-554, §1, 80 Stat. 425 (1966) ("An employee detailed under subsection (b) of this section is deemed . . . an employee of the agency from which detailed."); Pub. L. No. 92-318, § 502(m), 86 Stat. 352 (1972) ("With respect to the Virgin Islands and

The Supreme Court's case law provides further evidence on this point. In Aluminum Co. of America v. Central Lincoln Peoples' Utils. Dist., 467 U.S. 380 (1984), the Court reasoned that a statutory provision that "deemed [a federal power official] to have sufficient [energy] resources"[14] to enter into certain power contracts created an "express legal fiction" that "ensured" that the contracts "could not be challenged" on this ground.[15] Again, that understanding is flatly inconsistent with the commenters' suggestion that "deemed" means only "presumed."

In any case, the contention that the Commission should disfavor any reading of the 1996 Act that works a "radical change" in the law rests on a fundamental misunderstanding of the statute. As noted above, the Commission itself has recognized that the whole point of the 1996 Act is to make "sweeping changes" to deregulate the telecommunications industry.[16] Thus, the fact that the natural reading of the phrase "deemed lawful" gives it some substantive deregulatory bite (by freeing LECs from the fear that they will be subject to damages liability if a new or innovative tariff is ultimately found unlawful) provides more, not less, reason to accept it.

Guam, the enactment of this section shall be deemed to satisfy any requirement of State consent."); Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) ("Any plan of improvement proposed to be implemented in accordance with this subsection shall be deemed to satisfy the requirements for obtaining the appropriate permits required under the Secretary's authority."); Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) ("For purposes of section 1886 of the Social Security Act, Missouri Baptist Hospital of Sullivan in Sullivan, Missouri is deemed to be located in Franklin County, Missouri, retroactively effective for discharges beginning on or after December 22, 1987.")

[14] 16 U.S.C. § 839c(g)(7).

[15] 467 U.S. at 395 (emphasis added).

[16] NPRM ¶ 1.

Nor is there any merit to the argument, raised by AT&T, that the natural understanding of the statute cannot be accepted because it would result in incumbent LECs receiving better treatment than their competitors.[17] As an initial matter, AT&T simply misreads the statute. The statute does not make any "bizarre largesse" available only to incumbent LECs.[18] Rather, as the NPRM properly notes, it defines "local exchange carriers" -- the parties eligible for streamlined tariffing -- to include all such carriers, not just incumbents.[19] If other parties choose not to take advantage of the benefits provided by the new statute, it is only because the Commission has already given them even greater benefits, such as allowing them to file tariffs on a single day's notice.

In any event, there is nothing "patently unreasonable"[20] about Congress allowing incumbent LECs this benefit so that they can compete in an environment in which they have been required to offer significant benefits --including resale, interconnection, and access to unbundled elements -- to their competitors. Nor does the natural reading of the statute grant incumbent LECs the ability to abuse the tariff system by charging unreasonably high rates with impunity.[21] Under the current regime, the Commission retains the authority to suspend a tariff

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[17] AT&T Comments at 7.

[18] Id.

[19] NPRM ¶ 3.

[20] AT&T Comments at 7.

[21] See, e.g., Frontier Corp. Comments at 2; Competitive Telecommunication Ass'n Comments at 2.

before it goes into effect if it believes that a new rate raises significant legal questions. Equally important, Congress understood that, as it unleashed competition, parties will simply lose business if they offer unreasonably high rates. Congress quite evidently intended that that competitive fact of life, not centralized regulation, would provide the primary bulwark against high prices.[22]

Finally, MCI misses the mark in arguing that if LEC tariffs are treated as "lawful" once they become effective, the Commission's pre-effectiveness decisions as to whether to suspend such tariffs would become subject to judicial review.[23] Contrary to MCI's suggestion, these are independent questions. Whether or not the phrase "deemed lawful" is given its natural meaning, a decision not to suspend a tariff will remain precisely the type of permissive enforcement determination that courts routinely find unreviewable. The key facts counseling against judicial review of such decisions -- the immense practical difficulties that such judicial review would create and the 1996 Act's failure to alter the discretionary, standardless nature of the Communication Act's grant of suspension authority -- will not be altered by the outcome of this proceeding.[24] And, contrary to MCI's apparent belief, the new statute only strengthens the argument against reviewability because, by fostering competition, it makes a decision not to

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[22] See, e.g., 141 Cong. Rec. H8468 (daily ed. Aug. 4, 1995) (Rep. Oxley) ("The purpose of this legislation is to create the conditions for a competitive market and get the heavy hand of government regulation out of the way.").

[23] MCI Comments at 6-9.

[24] See Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1976).

suspend a tariff even more obviously a noncoercive regulatory determination.[25] In passing the new law, Congress intended to ensure that a disgruntled customer can go elsewhere with its business, even if it cannot obtain damages. Thus, now more than ever before, the appropriate response to a tariff rate that is too high is to buy services elsewhere, not to file a lawsuit.

II. THE COMMISSION MAY NOT DEFER A LEC TARIFF'S EFFECTIVENESS (NPRM ¶¶ 6, 13).

Many commenters concede that, by providing specific rules governing the effective dates of streamlined tariffs, Congress precluded the Commission from using its authority under § 203(b) to defer such filings (without suspending them) for up to 120 days.[26] Other parties, however, cling to the belief that the Commission retains the ability to use this deferral authority.[27]

These commenters are again fighting a losing battle with the statutory text. Section 204(a)(3) makes abundantly clear that the only way that a tariff eligible for streamlining would not be effective in 7/15 days is if the Commission exercises its § 204(a)(1) authority to suspend and investigate the tariff within that 7/15 day period. Such a tariff "shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase

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[25] See Heckler v. Chaney, 470 U.S. 821, 832 (1985) (emphasizing that nonreviewable enforcement decisions are not coercive).

[26] Sprint Comments at 2; Competitive Telecommunications Ass'n Comments at 2.

[27] See, e.g., AT&T Comments at 2; ACTA Comments at 2.

in rates) after the date on which it is filed with the Commission unless the Commission takes action under [§ 204(a)(1)] before the end of that 7-day or 15-day period, as is appropriate."[28]

The new provision, therefore, is not "silent" as to the possibility of deferral.[29] Rather, it affirmatively states that certain tariffs "shall be effective" unless specific action is taken under § 204(a)(1) within a set period of time. Section 204(a)(1), of course, makes no mention of deferrals.

Moreover, BellSouth explains persuasively that § 203(b) itself makes clear that it authorizes the Commission only to modify tariff requirements "made by or under the authority of this section."[30] Since the streamlining requirements at issue here arise from a different section (§ 204), § 203(b) has no role in this context.

III. STREAMLINING APPLIES TO ALL LEC TARIFFS (NPRM ¶¶ 16-19).

Many commenters urge the Commission to cabin the effect of streamlining by limiting the types of LEC tariffs eligible for such treatment. Although their precise arguments differ, these parties generally argue (1) that the language of the first sentence of § 204(a)(3) indicates that streamlining does not apply to new services[31] and (2) that the relationship between the first

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[28] Emphasis added.

[29] AT&T Comments at 2.

[30] 47 U.S.C. § 203(b)(2) (emphasis added); BellSouth Comments at 4.

[31] See, e.g., Sprint Comments at 4.

and second sentences of that provision suggests that only tariff filings involving rate changes are eligible for the 7/15 day notice periods.[32] Neither contention survives scrutiny.

To demonstrate why these claims are flawed, it is useful to set out the language at issue here in full:

> A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under [§ 204(a)(1)] before the end of that 7-day or 15-day period, as is appropriate.[33]

Several things are clear from this text. Initially, there is nothing about the first sentence that would limit its applicability to existing services. To the contrary, the first sentence refers broadly to filing "a new or revised charge, classification, regulation, or practice." Indeed, as we emphasized in our first Comments,[34] this is the very same language used in § 204(a)(1) to define the filings that the Commission may suspend. Thus, if Sprint, for example, were correct that the word "new" in § 204(a)(3) referred only to rates (and not services),[35] the Commission would be powerless to suspend new service filings. There is no indication that Congress ever intended such a result.

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[32] See, e.g., MCI Comments at 14.

[33] 47 U.S.C. § 204(a)(3) (emphases added).

[34] Southwestern Bell Comments at 6.

[35] Sprint Comments at 4.

The second sentence of the statute, moreover, applies every bit as broadly as the first. As U S WEST has properly emphasized,[36] the subject of the second sentence -- "any such charge, classification, regulation, or practice" -- refers directly back to the broad category of filings discussed in the first sentence. Thus, all those same kinds of filings "shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates)" after filing. To be sure, as many commenters emphasize, the sentence does refer parenthetically to "rates" in describing whether a 7 or 15 day period applies in a specific case. That, however, simply means that the Commission must determine in each instance whether a "charge, classification, regulation, or practice" is tantamount to an increase or decrease in rates in determining whether to apply a 7 or 15 day period. (As we noted in our Comments, the Commission has recognized that it is often difficult to discern the difference between a lower rate and a new service.[37]) What the parenthetical language in the statute does not do is give the Commission license to read the broad category of filings that are the very subject of the second sentence out of § 204(a)(3).

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[36] U S WEST Comments at 9.

[37] Southwestern Bell Comments at 7. New services should ordinarily qualify for 7-day treatment since they increase consumer welfare. See id. at 6-7.

IV. THE COMMISSION MUST REDUCE, NOT AUGMENT, THE FILING BURDENS FACED BY LECS (NPRM ¶¶ 20-34).

1. Some commenters have suggested that the Commission use this "streamlining" proceeding to adopt a variety of additional regulatory requirements. Such requirements are flatly inconsistent with congressional intent.

Commenters suggest a variety of backdoor ways to extend the tariff filing period for LECs. MCI, for example, argues that LECs should have to fax an "advance notice" of filing to interested parties at least seven days before actually filing a tariff and thus starting the 7/15 day clock.[38] And AT&T urges the Commission to adopt its tentative proposal to require Tariff Review Plans to be filed in advance. AT&T proposes 90 days notice.[39] Frontier Corporation goes even further. It suggests that LECs provide advance notice of proposed annual price cap rates, which would then be subject to a pre-filing order, as well as comments. Only after all these hurdles were cleared could a LEC file its annual price cap rates on 7/15 days notice.[40]

The short answer to all these suggestions is that they cannot be squared with the statute. Congress established a 7/15 day notice period for tariff filings. Its intent cannot be subverted

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[38] MCI Comments at 21 (proposing 14 and 22 day notice periods).

[39] AT&T Comments at 17 (proposing 97 and 105 day notice periods).

[40] Frontier Comments at 5 (proposing indefinite notice periods).

simply by calling a tariff filing a "pre-filing," an "advance notice," or anything else for that matter.[41] Any other conclusion would strip the statutory mandate of all meaning.

In the same vein, some parties suggest that the Commission adopt various requirements to make LEC filings more burdensome than they already are. Thus, numerous commenters urge the Commission to adopt its tentative conclusion that summaries and legal analyses be included with all streamlined LEC tariffs.[42] Another party suggests that a carrier must forfeit the right to keep proprietary information confidential if it wants to file in a shortened period.[43] Although these kinds of suggestions are plentiful, they are unsupported by any demonstration as to how these additional burdens conform to the plain statutory directive to "streamline" tariffing. No such demonstration is possible.

2. Finally, we note that several parties echo our suggestion[44] that the Commission use this opportunity to enact true streamlining measures that do away with several particularly burdensome and unnecessary tariffing requirements. Alltel and Bell Atlantic, for example, both argue forcefully that the Commission should eliminate many of its requirements involving the

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[41] In the case of the Tariff Review Plans, this pre-filing requirement is particularly perverse. The sole purpose of the cost information that would be submitted early is to support proposed rates. This cost information "has no significance apart from the tariff filing that it supports." BellSouth Comments at 17.

[42]NPRM ¶ 25; GSA Comments at 12.

[43]Telecommunications Resellers Ass'n Comments at 12-13.

[44] Southwestern Bell Comments at 22-23.

submission of cost data.[45] In many instances, those submissions create the risk of disclosing sensitive information to competitors. The Commission should move expeditiously to abolish these rules.

Similarly, the Commission should take this opportunity to address the Part 69 waiver process. As several parties have emphasized in their comments, the complex waiver rules create an unnecessary and potentially lengthy delay in bringing new services to market.[46] Indeed, as the rules currently read, the Commission has no time limit at all for acting on such a request. The ever-present possibility of a long delay in obtaining a waiver provides a powerful disincentive to innovation by incumbent LECs and a strong artificial incentive for customers to select other carriers that can respond rapidly to emerging market demand. The waiver rules thus constitute precisely the kind of regulatory encumbrance that the Commission should quickly remove.

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[45] Alltel Comments at 2-3; Bell Atlantic Comments at 7-8.

[46] USTA Comments at 6; GTE Comments at 8; NYNEX Comments at 7; Bell Atlantic Comments at 3.

CONCLUSION

Southwestern Bell Telephone Company respectfully requests that the Commission implement § 204(a)(3) as described in these Reply Comments as well as in its opening Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 1996, I caused one copy of the Reply Comments to be served upon the parties listed on the attached service list by first-class mail, postage prepaid.

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